Caterpillar, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 974. Cases 33–CA–10014 and 33–CA–10038

August 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On January 5, 1995, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed limited cross-exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision. The General Counsel, the Charging Party, and the Respondent all filed answering briefs, and the Respondent filed reply briefs to the General Counsel's and the Charging Party's answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.[3]

1. The judge found, and we agree, that the Respondent discriminated against reinstated strikers in violation of Section 8(a)(3) and (1) of the Act when it excluded crossovers from its June 8, 1992 restaffing. In addition to adopting the judge's rationale, we emphasize that this is not the same type of situation as in *TWA v. Flight Attendants*.[4] In *TWA*, the Supreme Court held that an employer is not required to lay off junior crossover employees in order to reinstate more senior full-term strikers at the conclusion of a strike. Our unfair labor practice finding here does not conflict with that decision.

On April 14, 1992, the strikers made an unconditional offer to return to work. Under *TWA*, the Respondent had no obligation to displace crossovers in order to accommodate the more senior full-term strikers at the conclusion of the strike, and no party contends otherwise. The strikers were reinstated over a period of approximately 6 weeks. By May 26, all strikers were reinstated.

In June, approximately 2 weeks after the last group of strikers was reinstated, the Respondent conducted a restaffing in which some 500 employees were disadvantaged by being moved from their assigned shift, classification, and/or department. The crossovers were expressly excluded from this move. There is nothing in *TWA* that privileged the Respondent to grant such a preference to the crossovers. In sum, *TWA* has no application here because this case does not involve the initial placement of returning strikers, but rather discrimination against strikers after their reinstatement. Accordingly, we conclude that by excluding crossovers from its June restaffing, the Respondent gave preferential treatment to the crossovers and discriminated against the reinstated strikers in violation of Section 8(a)(3) and (1) of the Act. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

2. The judge found that in November 1992, the Respondent committed an independent 8(a)(3) violation by reassigning employee Nick Whitfield to the work pool instead of conducting a reduction in force (RIF) and allowing him to exercise his seniority. We disagree.

It is undisputed that under the contract the Respondent may either utilize reassignment or run a RIF when an employee is declared ''surplus'' (i.e., his job is no longer needed for production purposes). The General Counsel contends that the Respondent deliberately chose not to run a RIF when it reassigned Whitfield (a full-term striker), in order to protect junior crossovers. The General Counsel's evidence in support of this contention consists essentially of the testimony of a grievance committeeman that in his opinion the Respondent should have conducted a RIF and permitted Whitfield to ''bump'' less senior crossovers. On the other hand, the Respondent's labor relations manager, Stevens, testified that, particularly since the advent of

[1] The judge dismissed the complaint in Case 33–CA–10038, which alleges that the Respondent violated Sec. 8(a)(5) by refusing to provide the Union with the names of the crossover employees. The Charging Party does not except to the judge's dismissal of that complaint, but requests that the Board not adopt the judge's findings and observations which are unnecessary to his essential holding. We adopt the judge's dismissal of the complaint on the ground that the Union was not entitled to the requested information in the exact form in which it sought it, in light of the fact that the Respondent provided adequate alternative information to enable the Union to perform its representative functions. We find it unnecessary to rely on the remainder of the judge's rationale.

[2] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In his recommended Order, the judge inadvertently failed to include a make-whole remedy for any employee who was disadvantaged as a result of job assignments based on the postings between April 14 and 16, 1992. We shall modify the recommended Order accordingly and substitute a new notice. We shall also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). Furthermore, in accordance with our usual practice, we shall limit the scope of the notice posting requirement to the East Peoria, Illinois facility where the unfair labor practices occurred.

[4] 489 U.S. 426 (1989).

the Secure Employee List (SEL) (a 6-year job security plan), it is unproductive to run a RIF for minor adjustments in the work force, because under SEL there is ultimately no reduction in the work force. Stevens explained that it is more efficient to reassign an employee whose job is eliminated rather than cause a series of bumps that would disrupt production and require extensive training but ultimately result in the same number of people on the payroll.

In light of the foregoing, we find that the record evidence, considered as a whole, does not support the judge's unfair labor practice finding. Given the undisputed fact that there was no contractual obligation to conduct a RIF for one employee and the unrebutted testimony that it was more efficient to use the reassignment option, we find that even assuming the General Counsel has established a prima facie case of discrimination, the Respondent has shown that it would have reassigned Whitfield to the work pool even in the absence of his union activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[5]

3. We agree with the judge that the Respondent unlawfully gave crossovers preferential treatment in job assignments based on bids to which full-term strikers had no access. In adopting this aspect of the judge's decision, we emphasize that the jobs were posted on April 14, 1992, the very day on which the strikers made their unconditional offer to return to work, and remained posted until April 16, 1992. Under these circumstances, we agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by denying the unreinstated strikers the right to bid on the jobs. See *Medite of New Mexico, Inc.*, 314 NLRB 1145, 1147 (1994), enfd. 72 F.3d 780 (10th Cir. 1995); *Oregon Steel Mills*, 291 NLRB 185, 190 (1988), enfd. mem. 134 LRRM 2432 (9th Cir. 1989), cert. denied 496 U.S. 925 (1990).

Our dissenting colleague cites a provision in the expired contract that provided that only employees who were ''actively at work'' could bid on job openings. According to our colleague, this contractual provision prevented the strikers, who had requested reinstatement on April 14, but who were not reinstated until April 20, from bidding on the jobs that were posted April 14–16. Thus, our colleague concludes, the Respondent did not discriminate between the unreinstated strikers and the crossovers, because it treated the unreinstated strikers no differently from others absent from the workplace, such as employees on vacation or sick leave.

However, this is pure speculation on the part of our dissenting colleague. The Respondent never made this contention; it neither presented any evidence on this contractual provision nor did it brief it to either the administrative law judge or the Board. In fact, the only testimony elicited at the hearing on this contractual provision was elicited by counsel for the General Counsel, but that testimony did not mention whether there were crossover employees who were on sick leave or vacation on April 14–16 and thus not permitted to bid on the posted jobs. Therefore, on the record before us, it is clear that the unreinstated strikers, who had requested reinstatement on April 14, but who were not permitted to bid on the jobs that were posted April 14–16, were treated differently from the crossovers, who were permitted to bid on those jobs. This different treatment of the unreinstated strikers amounts to discrimination ''which adversely affected employee rights to *some* extent,'' and the Respondent will be found to have violated the Act unless it meets its ''burden of establishing 'that [it] was motivated by legitimate objectives''' in discriminating against the unreinstated strikers. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380 (1967) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967)). Because, here, as in *Great Dane* and *Fleetwood*, the Respondent presented ''no evidence of proper motivation,'' the Respondent ''committed an unfair labor practice,'' without reference to intent. *Great Dane*, supra at 35; *Fleetwood*, supra at 380.

Further, our dissenting colleague's attempt to distinguish *Medite* and *Oregon Steel Mills* on their facts does not withstand scrutiny. In *Medite*, the Board described the job bidding procedure as follows: ''[A]ny full-time active employee is permitted to bid for the job.'' Supra at 1147. In *Oregon Steel Mills*, the Board described the job bidding procedure as follows: ''The bidding was limited to employees actually working.'' 291 NLRB at 188. In the case at bar, the expired collective-bargaining agreement provided that job openings may be bid on by employees ''actively at work.'' Unlike our dissenting colleague, we do not believe that *Medite* and *Oregon Steel Mills* can be fairly distinguished on the basis of the wording of the particular job bidding procedures.

Finally, contrary to the dissent's apparent position, the ''discrimination'' prohibited by Section 8(a)(3) is not limited simply to distinctions between strikers and nonstrikers. Section 8(a)(3) ''discrimination'' includes the difference between conduct that takes place because of a strike and conduct that would not have taken place in the absence of a strike. See *Industrial Workers AIW Local 289 v. NLRB*, 476 F.2d 868, 877

[5] Our reversal of the judge's 8(a)(3) finding with respect to Whitfield's reassignment does not require any modification of the judge's recommended Order because the judge did not order a specific remedy for this violation. The judge found instead that the remedy for the Whitfield reassignment was subsumed in what the judge termed the ''broader remedy'' he ordered for the Respondent's unfair labor practice of according preferential treatment to crossovers by excluding them from consideration in the June 8, 1992 reassignment. Our decision today in no way affects that ''broader remedy.''

(D.C. Cir. 1973); *NLRB v. Jemco*, 465 F.2d 1148, 1152 (6th Cir. 1972), cert. denied 409 U.S. 1109 (1973). The dissent ignores the fact that had the unreinstated strikers not engaged in a protected concerted activity, they would have been entitled to bid on the posted jobs. The dissent's contention that there was no ''discrimination'' because the strikers were treated just like employees on vacation or sick leave (assuming arguendo this to be true) is faulty because an absence from the workplace due to vacation or illness does not rise to the level of a lawful strike, participation in which is protected by Section 7 and Section 13 of the National Labor Relations Act.

In sum, we find that by denying the unreinstated strikers the right to bid on jobs posted after their unconditional offer to return to work, the Respondent plainly discouraged ''a union activity protected by Section 7 [and] also discourage[d] and discriminate[d] against membership in a labor organization'' in violation of Section 8(a)(3) and (1) of the Act. *Industrial Workers*, supra at 877.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Caterpillar, Inc., Peoria, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Giving preferential treatment in job assignments to employees who quit a strike in progress and return to work.

(b) Discriminating against full-term strikers in job assignments.

(c) Announcing to employees who remained on strike during its entire duration that those who quit and returned to work had been given preferential treatment in job assignments and tenure.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the June 8, 1992 move at the Track Type Tractor Business Unit and reassign employees based on seniority.

(b) Make whole any employee who was disadvantaged as a result of the June 8, 1992 move, in the manner set forth in the remedy section of the judge's decision.

(c) Reopen for bidding the jobs assigned to M. A. Smith, G. W. Wagner, Steve Albritton, V. J. Thomas, M. E. Mustard, J. D. Rapp, and J. F. Humphreys based on postings between April 14 and 16, 1992.

(d) Make whole any employee who was disadvantaged as a result of job assignments based on the postings between April 14 and 16, 1992, in the manner set forth in the remedy section of the judge's decision.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in East Peoria, Illinois, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 1992.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 33–CA–10038 is dismissed in its entirety.

Separate statement of CHAIRMAN GOULD.

The Respondent has requested my recusal from any cases involving the Respondent in connection with its ongoing labor dispute with UAW.[1] It asserts, based on my public statements regarding the Board's decision to seek an injunction against the Respondent and references to the Respondent in my scholarly writings, that I have impermissibly prejudged certain facts rel-

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] On December 19, 1994, the Respondent filed a motion seeking the recusal of myself and Member Browning ''from consideration of any cases involving Caterpillar in connection with its ongoing labor dispute'' with the UAW. The motion was denied on January 10, 1995. The Respondent filed a motion for reconsideration on April 19, 1995. That motion was denied on May 11, 1995. The May 11, 1995 order denying the motion for reconsideration stated that Member Browning and I would set forth our reasons for denying the Respondent's motion for recusal and motion for reconsideration in the first published decision in which we considered a party's exceptions to an administrative law judge's decision.

evant to the dispute and that my assumption of an adjudicative role in these cases would create an appearance of unfairness. For the reasons set forth below, I conclude that the Respondent's request should be denied.

In support of its request for my recusal, the Respondent cites the Due Process Clause and cases decided under 28 U.S.C. § 455 governing the disqualification of Federal justices, judges, and magistrates. While the legal developments governing the standards for recusal/disqualification both in Federal and administrative proceedings have been similar, the ''appearance-of-impropriety'' standard which applies to Federal judges under section 455 has not been held to be applicable in the administrative forum. *Greenberg v. Board of Governors of the Federal Reserve*, 968 F.2d 164, 167 (2d Cir. 1992). In *Greenberg*, the court held, inter alia, that the high standard of propriety required under section 455 applies only to Supreme Court justices and other courts created by act of Congress. In an administrative forum, courts tend to require a showing of ''actual bias'' or ''actual'' partiality before recusal will be required. *Robbins v. Ong*, 452 F.Supp. 110, 116 (S.D. Ga. 1978) (citing *Megill v. Board of Regents of State of Florida*, 541 F.2d 1073, 1079 (5th Cir. 1976). However, I take seriously the standards applicable to judges and believe that my participation in these cases conforms with such standards.

Under the actual bias standard, public statements are sufficient to disqualify only where they reveal that an agency adjudicator has ''adjudged the facts as well as the law of a particular case in advance of hearing it'' and ''made up her mind about important and specific factual questions and . . . [is] impervious to contrary evidence.'' *Steelworkers v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980), cert. denied 453 U.S. 913 (1981) (citations omitted). Even where the appearance of impropriety standard is applicable, the courts have required that ''an informed, reasonable observer would doubt the judge's impartiality,'' not that ''someone who did *not* know the circumstances . . . might perceive the possibility'' that the judge would be partial. *Matter of National Union Fire Insurance Co.*, 839 F.2d 1226, 1229 (7th Cir. 1988) (emphasis in original). Applying these standards to the conduct about which the Respondent complains, I conclude that my participation in cases involving the Respondent in no way violates either the appearance of impropriety or actual bias standards.

In 1993, while a professor at Stanford University, I published a book which both describes and sets forth views about American labor law: *Agenda For Reform*. In my book, I make reference to the UAW strike against the Respondent which ended in April 1992. The Respondent claims on the basis of these passages that I have prejudged key issues in cases now before the Board. The Respondent has failed to show, however, any relation between the references to the Respondent in my book and factual and legal issues in pending cases. In its brief, the Respondent states that the principal issues in all the pending cases are the legality of its conduct in response to UAW activities and tactics *following* the recess of the 1992 strike. In my book, I use the strike as an example to illustrate the declining effectiveness of economic strikes in general, particularly in the face of employers' increasing willingness to use permanent replacement workers. I do not discuss the Respondent's conduct following the strike. In any event, none of the references to the Respondent in my book in any way assert that the Respondent engaged in conduct which violated the NLRA or otherwise was illegal. Under these circumstances, there can be no legitimate concern on the basis of my writings that I have prejudged specific factual and legal questions in pending cases.

I must also reject the Respondent's characterization of my speech of May 6, 1994, to the Metropolitan Detroit AFL–CIO. I stated:

> In the almost 10 weeks that I have been in my job, I and my colleagues have signed 10 requests for temporary injunctions against Employer unfair labor practices which were designed to frustrate the collective bargaining process—one of them aimed at Caterpillar Company and methods it has used in its ongoing labor dispute with the United Auto Workers.

Section 10(j) of the Act authorizes the Board, on issuance of a complaint by the Board's General Counsel, to ''petition any district court of the United States . . . for appropriate temporary relief or restraining order.'' In seeking an injunction under Section 10(j), the Board does not decide the ultimate merits of the labor dispute, but only that there is reasonable cause to believe that unfair labor practices have been committed. The procedures under which the Board seeks interim relief against a respondent and subsequently adjudicates the underlying case involving that respondent have repeatedly been upheld as constitutional. See *Kessel Food Markets v. NLRB*, 868 F.2d 881, 888 (6th Cir. 1989), cert. denied 493 U.S. 820 (1989); *NLRB v. Sanford Home for Adults*, 669 F.2d 35, 37 (2d Cir. 1981); *Eisenberg ex rel NLRB v. Holland Rantos Co.*, 583 F.2d 100, 104 fn. 8 (3d Cir. 1978). See generally *Withrow v. Larkin*, 421 U.S. 35, 56–57 (1975).

In my speech I reported the Board's actions under Section 10(j). I did not, as the Respondent alleges, conclude that it ''had engaged in unfair labor practices.'' The Board and Regional Offices routinely issue press releases which report the status of Board proceedings under Section 10(j). Agency members are also free to inform the public of agency activities and policies. See *American Medical Assn. v. FTC*, 638

F.2d 443, 449 (2d Cir. 1980), affd. 455 U.S. 676 (1982). If I were to grant the Respondent's motion and recuse myself because of my public statements, any other Board member who states publicly that he has approved a 10(j) request might also be precluded from hearing the related unfair labor practice or any other unfair labor practice between the same parties. This would seriously undermine the Board's ability to carry out its statutory obligations. I do not believe that this result is mandated by due process or the ''actual bias'' and ''appearance of impropriety'' standards alluded to above.

In fact, the Sixth Circuit has rejected reasoning substantially similar to that advanced by the Respondent. In *NLRB v. Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir. 1965), the then-Chairman of the Board delivered a speech in which he explained the Board's policies on seeking interim injunctions under Section 10(j), the same provision referenced in my speech. In the course of his explanation, he referred to the Kaase company's situation as one where ''the violation seemed clear and the damage irreparable.'' Id. at 28. Kaase moved to dismiss the Board's petition for enforcement of its final order, citing the reference as evidence of impermissible prejudgment. Though the then-Chairman did not sit on the panel which considered Kaase's case, the court did not appear to rely on this fact in denying the motion:

> Whether it was politic for [the then] Chairman McCulloch to have referred to the Kaase matter is not our concern. Quite obviously, the Board under advice of its General Counsel was of an initial impression that a violation had occurred. Otherwise, an injunction would not have been sought. Such impression, however, did not foreclose impartial consideration of the matter upon a full hearing. A judge who is sufficiently impressed with a plaintiff's case to issue a preliminary injunction is not thereby disqualified from presiding at a trial on the merits.

Id. See also *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 80 (10th Cir. 1972) (no impermissible prejudgment where commission referenced pending administrative complaint against company to ''illustrate a point''), cert. denied 416 U.S. 909 (1974). The same conclusion is applicable in this case, where, by comparison, my remarks were much less suggestive of a prejudgment of the merits of the case.

Separate Statement of MEMBER BROWNING.

The Respondent has filed three motions seeking my recusal ''from consideration of any cases involving Caterpillar in connection with its ongoing labor dispute'' with the Charging Party. The Respondent's motions allege bias, prejudgment, and a personal or financial interest in the result in these cases. For the reasons set forth below, I decline to recuse myself from all *Caterpillar* cases as requested by the Respondent.

I.

On May 12, 1994, the Respondent filed its first motion seeking my recusal from all *Caterpillar* cases. Pending before the Board at that time were requests for special permission to appeal an order of an administrative law judge. Because I was not on the panel designated to rule on the requests for special permission to appeal, on May 17, 1994, the Board denied the Respondent's recusal motion as moot, without prejudice to renewal at an appropriate time.

On December 19, 1994, the Respondent renewed its motion for recusal. The primary basis for the Respondent's motion is that my spouse, Joseph Lurie, a partner in the law firm of Galfand, Berger, Lurie, Brigham, Jacobs, Swan, Jurewicz & Jensen, has represented parties in several lawsuits against Caterpillar. Specifically, the motion alleges that Lurie recently represented plaintiffs in two product liability lawsuits against Caterpillar in which the plaintiffs lost and costs were awarded to Caterpillar,[1] and that he represented parties in two other product liability lawsuits against Caterpillar that have settled.[2] According to the Respondent, under these circumstances, I have ''real or apparent interests'' adverse to Caterpillar's, a basis for personal bias against it, and I may have made judgments concerning the Company on the basis of information outside the record.

In addition, the Respondent claims that the grounds for recusal have been ''amplified'' by the filing of its initial recusal motion because I have now been the subject ''of arguably personal criticism from a party appearing before [me] and could reasonably be expected to be further affected by that fact.''

On January 10, 1995, I denied the Respondent's second recusal motion, stating that an explicated order would follow.

On April 19, 1995, the Respondent filed a motion for reconsideration, requesting that I reconsider my decision to deny the second recusal motion. In this latest motion, the Respondent contends that, after the filing of its December 1994 motion, certain ''additional and clarified facts'' were brought to its attention, and it set them forth in an affidavit it submitted from its senior

[1] *Snyder v. Caterpillar, Inc.*, Case 94–7016, and *Murray v. Caterpillar, Inc.*, Case 93–7367.

[2] *Rouse v. Caterpillar Industrial, Inc.*, Case 5370, and *MacArthur v. Caterpillar Industrial, Inc.*, Case 4514, both in the Pennsylvania Court of Common Pleas.

I recently learned that my spouse's law firm was engaged by another plaintiff in a lawsuit against Caterpillar, *Barron v. Caterpillar*, Case 95–5149 (E.D. Pa.), a products liability claim. The plaintiff in that case is being represented by one of my husband's law partners, and my husband has no involvement in the case.

labor relations consultant for its corporate labor relations department, David W. Stevens.

According to the Stevens affidavit, the *Snyder* and *Murray* cases that the Respondent had referred to in its December 1994 motion were actually employment discrimination suits, not product liability suits. With respect to the *Rouse* and *MacArthur* cases, the Stevens affidavit reiterates that they are product liability suits that have settled, but adds that the plaintiffs were represented by my spouse ''or his firm.'' Finally, the Stevens affidavit alleges that an unfair labor practice charge in Case 33–CA–10192, currently pending before an administrative law judge, involves, inter alia, an issue concerning whether the Respondent violated the Act by prohibiting the Charging Party from posting a notice publicizing an April 17, 1993 seminar on the Americans with Disabilities Act in which my husband participated.

After carefully considering the motion for reconsideration, on May 11, 1995, I again denied the Respondent's request that I recuse myself from all *Caterpillar* cases, stating that I would set forth my reasoning in the first case in which I participated considering a party's exceptions to an administrative law judge's decision. I reserved ruling, however, on the Respondent's motion insofar as it sought to disqualify me from Case 33–CA–10192, believing that that recusal decision could best be made when all the facts were before me, i.e., after the hearing has closed, the judge has issued his decision, and a party has filed exceptions with the Board.

The Respondent contends, and properly so, that due process ''requires no conflict of interest, personal bias or partiality, prejudgment of, or preconceived notions concerning the facts of the case at issue by the decisionmakers.'' In support of its motion for my recusal, the Respondent cites 28 U.S.C. § 455 governing the disqualification of Federal judges and analogizes cases decided thereunder to the standards for administrative adjudicators. I believe that the Standards of Ethical Conduct for Employees of the Executive Branch as set forth in 5 CFR Part 2635, rather than 28 U.S.C. § 455, are the standards most germane to the issue of my recusal.[3] I note also that it is questionable whether 28 U.S.C. § 455 applies to administrative officials and that it has been held to apply only to Supreme Court justices and judges in courts created by an act of Congress.[4] However, the standards for disqualification of administrative adjudicators and judges are clear ly compatible and, under either standard, for the reasons set forth below, I believe that my recusal is unwarranted.

II.

The Standards of Conduct for Employees of the Executive Branch[5] mandate, inter alia, that Federal employees shall not hold financial interests that conflict with the conscientious performance of their duty,[6] shall not participate in matters in which a person with whom they have a ''covered relationship''[7] is a party or represents a party,[8] and shall endeavor to avoid actions creating the appearance that they are violating the law or ethical standards.[9]

Specifically, as to financial interests, the regulations provide:

> (a) *Statutory prohibition*. An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.[10]

These financial interest provisions do not require my recusal because the cases in which my spouse represented a party in suits against Caterpillar are now closed, and he has been paid. Therefore, even assuming that the pendency of such cases could ever constitute a disqualifying financial interest in the outcome of Board proceedings, neither my husband nor I have such an interest.[11]

The Respondent acknowledges that my spouse ''may not have a direct and immediate financial interest'' in the Board proceedings, but argues that ''awards in future product liability or other tort cases could be influenced by public impressions or misimpressions of Caterpillar emerging from these proceedings.''

The Respondent's argument, based as it is on surmise, supposition, and speculation, simply does not meet the legal standard for disqualification. Thus, in *Matter of Billedeaux*, 972 F.2d 104, 106 (5th Cir. 1992), a case with closely analogous facts, the Fifth

[3] For the reasons discussed below, I also do not believe that 18 U.S.C. ch. 11, § 208 and 5 CFR subpt. D governing conflicting financial interests would require my recusal.

[4] See, e.g., *Greenberg v. Board of Governors of the Federal Reserve*, 968 F.2d 164, 167 (2d Cir. 1992).

[5] Executive Order 12674 of April 12, 1989 (as modified by Executive Order 12731); 5 CFR pt. 2635 (effective February 3, 1993).

[6] 5 CFR § 2635.101(b)(2).

[7] A ''covered relationship'' as defined at 5 CFR § 2635.502(b)(1) would include a spousal relationship.

[8] 5 CFR § 2635.501.

[9] 5 CFR § 2635.101(b)(14).

[10] 5 CFR § 2635.402.

[11] With regard to the case that my husband's law partner recently took on, that case does not constitute a disqualifying financial interest either because, as more fully elaborated infra, whatever actions I might take on the *Caterpillar* cases before the Board would not have a ''direct and predictable effect'' on any financial interest that my husband might have in that case.

Circuit, applying a similar prohibition in 28 U.S.C. § 455, refused to disqualify a district court judge simply because her spouse was a partner in a law firm that actively represented the defendant in other cases. The court held that ''a reasonable person'' aware of ''all the relevant facts'' would know that the judge's interest ''in the fate of her husband's law firm's sometime client is so remote and speculative as to dispel any perception of impropriety.''

The Respondent contends that an action I take in any of the many *Caterpillar* cases that may reach the Board could possibly have some effect on a future jury award in a hypothetical case which my husband has not yet even undertaken, or that my participation in any of these cases could possibly affect my husband's decision whether or not to undertake a case on behalf of a client against Caterpillar. These contentions are even more speculative than the contentions of potential bias made in the *Billedeaux* case, and provide absolutely no basis for concluding that an action I take in any of the *Caterpillar* cases would have a ''direct and predictable effect'' on any financial interest belonging to my spouse. First, the Respondent's contentions seem to be based on an assumption that because my husband has represented four clients in lawsuits which happened to involve Caterpillar, the public should reasonably have the impression that his livelihood is dependent to a substantial extent on lawsuits against the Respondent and that he will predictably undertake such suits in the future. In my view, these are not reasonable assumptions. Second, it simply requires too many leaps to even speculate that any action I take on one of these cases could affect my husband's decision as to whether or not to pursue a potential client's claim against Caterpillar. Finally, even assuming that my husband has a potential financial interest in current cases pending against Caterpillar,[12] the Respondent's contention that any actions that I take with regard to pending unfair labor practice cases involving Caterpillar would have a ''direct and predictable effect'' on that financial interest is simply too speculative. The possibility that a jury in a products liability case would or could consider the results of an unfair labor practice case involving the defendant is simply too remote and speculative to be the type of ''direct and predictable effect'' contemplated by the standards applicable to recusal due to financial conflicts of interest. See *Matter of Billedeaux*, supra.

III.

Nor is my participation prohibited by 5 CFR § 2635.501 et seq. (subpt. E - Impartiality in Performing Official Duties). 5 CFR § 2635.502, governing personal and business relationships provides:

> (a) *Consideration of appearances by the employee*. Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter . . . .

In addition, 5 CFR § 2635.101(b)(14) provides:

> (14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

Because, as set forth above, neither I nor my spouse have any financial interest in the outcome of this proceeding, it is incumbent on the Respondent to demonstrate either that a person with whom I have a ''covered relationship'' is a party or represents a party to this proceeding, or that there are other circumstances which would lead a reasonable person with knowledge of the relevant facts to question my impartiality in this proceeding.

The Respondent's motions are based on my husband's alleged involvement with a party to this proceeding. Although my husband has in the past represented clients in lawsuits *against Caterpillar*, a party to this proceeding, clearly he is not a party and does not represent any party in these cases. Thus, the only remaining question is whether a reasonable person with knowledge of the facts would question my impartiality in these matters, i.e., is there any impropriety or appearance of impropriety. I conclude that there is not.

Contrary to the Respondent's contention, I have not discussed any *Caterpillar* cases with my spouse and, consequently, I have not been ''exposed to information'' or ''made judgments concerning Caterpillar, its personnel, products and/or business practices.'' Indeed, until the Respondent filed its initial recusal motion in May 1994, I was not even aware that my husband or his firm had ever represented any party in a lawsuit against Caterpillar. Once I received the recusal motion, I took immediate action to insure that I would not receive any information from my spouse or his firm concerning a *Caterpillar* case, even by inadvertence. According to the Respondent's initial motion, as of May

[12] The fact that my husband's law partner recently undertook to represent a plaintiff against Caterpillar in a products liability action could conceivably lead to some financial remuneration for my husband.

1994, the *Rouse* and *MacArthur* cases had settled, but the *Snyder* and *Murray* cases were pending in the Third Circuit. According to the Respondent's second motion, by December 1994, the *Snyder* and *Murray* cases were completed. Under these circumstances, I do not believe that there is any actual or apparent impropriety in my acting on the cases currently pending before me.

There is also no substance to the Respondent's assertion that I should recuse myself because, as a result of the Respondent's first recusal motion, I have been ''the subject of arguably personal criticism from a party.'' If merit were found in the Respondent's contention, an adjudicator would effectively be divested of any authority to decide the recusal question, and a party would be able to obtain automatic disqualification by the simple expedient of filing repeated recusal motions. It is well established, however, that the recusal decision is not to be made by a party, but rather ''is committed to the sound discretion of the . . . judge.'' *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1166 (5th Cir. 1982), cert. denied 464 U.S. 814 (1983).

IV.

As discussed above, I believe that it is the Standards of Ethical Conduct for Employees of the Executive Branch, rather than the standards for Federal judges, which control the recusal issue in this proceeding. However, under the latter criteria I would still not find it necessary to recuse myself.

As set forth in the Respondent's December 1994 motion, the circumstances under which a Federal judge must disqualify himself include the following: (1) ''his impartiality [in the proceeding] might reasonably be questioned''; (2) ''he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding''; or (3) he knows that he or his spouse ''has a financial interest in the subject matter in controversy . . . or any other interest that could be substantially affected by the outcome of the proceeding.'' See 28 U.S.C. § 455.

Under this section, ''[t]he movant must show that, if a reasonable man knew of all the circumstances, he would harbor doubts about the judge's impartiality.'' *Chitimacha Tribe*, supra at 1165. The purpose of the statute is ''to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.'' *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988). The criteria are substantially the same as those under the Standards of Ethical Conduct for Employees of the Executive Branch discussed above, and the same rationale would lead me to deny the Respondent's recusal motions.

V.

As discussed above, because the cases in which my spouse represented plaintiffs in claims against Caterpillar are now closed, he can have no financial interest whatsoever in the Board proceedings, even the one asserted by the Respondent.[13] Nor does he have ''any other interest'' that ''could be substantially affected'' by the Board proceedings. Similarly, I have no financial interest whatsoever in the Board proceedings. I have no personal interest in the Board proceedings, and I do not have some ''other interest'' that ''could be substantially affected'' by the Board proceedings. I have no bias or prejudice concerning any party to the Board proceedings. My sole and exclusive interest in the Board proceedings lies in discharging my statutory obligations as a Member of the National Labor Relations Board.

If any of the cases that come before me raise allegations that directly concern my spouse, I am certainly willing to consider the facts of those particular cases to determine if any action I take could conceivably have a substantial effect on his livelihood, as I indicated in my ruling on the Respondent's motion for reconsideration, concerning Case 33–CA–10192.

The Respondent has failed to substantiate its contention that I should recuse myself from all *Caterpillar* cases on the basis of bias, prejudgment, a personal or financial interest, or the appearance thereof. A reasonable person with knowledge of all the facts and circumstances would not harbor doubts about my impartiality merely because my husband and his law firm represented parties in unrelated cases against Caterpillar. Accordingly, I adhere to my prior rulings denying the Respondent's motions to disqualify me from all *Caterpillar* cases.

MEMBER COHEN, dissenting in part.

My colleagues adopt the judge's finding that the Respondent violated Section 8(a)(3) by allowing only ''crossover'' employees, and not unreinstated economic strikers, to bid on vacant jobs during the period after the strike ended but before the first strikers were recalled to work. I find no discrimination and, therefore, I dissent.

The Union made an unconditional offer to end the strike on April 14, 1992, but the Respondent did not begin to reinstate the strikers until April 20. There is no allegation that the delay in reinstating the strikers was unlawful.

Between April 14 and 16, the Respondent posted several job openings for bidding. Consistent with the terms of the expired collective-bargaining agreement and past practice, the openings were posted for 48

[13] For the reasons set forth supra, the representation of a plaintiff in a products liability case against Caterpillar, which I recently learned about, also does not create a disabling conflict of interest.

hours, and could be bid on only by employees who were ''actively at work''; consequently, the unreinstated strikers were unable to bid. None of the vacant jobs were actually filled until after April 20.

The judge found that the Respondent unlawfully discriminated against the unreinstated strikers by not allowing them to bid on the vacant jobs. Citing *Waterbury Hospital*, 300 NLRB 992 (1990), he reasoned that because the successful bidders were not working in those jobs at the time the strike ended, they could not be considered permanent replacements. The majority adopts the judge's finding of unlawful discrimination, but on a different theory.[1] They rely on *Medite of New Mexico, Inc.*, 314 NLRB 1145 (1994), and *Oregon Steel Mills*, 291 NLRB 185 (1990), in which the Board found that employers unlawfully discriminated against former strikers by preventing them from bidding on posted vacancies when other employees were allowed to do so. Those cases, however, are readily distinguishable and are not controlling here.[2]

In my view, neither my colleagues' rationale nor that of the judge is persuasive when applied to the facts of this case. The parties' expired contract provided that vacant jobs were to be posted for 48 hours and could be bid on only by individuals who were *actively at work*. That restriction on its face excludes unreinstated strikers as well as employees who are out for other reasons such as vacations or sick leave. There is no evidence or claim that the strikers were treated differently from any other individuals who were not ''actively at work.'' It follows, then, that the Respondent did not discriminate against the strikers because they exercised their Section 7 right to strike.[3]

For the foregoing reasons, I part company with my colleagues on this issue and would not find the violation. In all other respects, I join in the majority opinion.

[1] My colleagues correctly eschew *Waterbury*. The issue there was whether there were permanent replacements in certain jobs. The Board answered the question in the negative, and thus the strikers had *Laidlaw Corp.*, 171 NLRB 1366 (1968) rights to those jobs. Those issues are not present here. The strikers here do not have *Laidlaw* rights to the jobs at issue. They have only the right to be free from discrimination.

[2] In *Medite*, the employer did not allow former strikers to bid on vacancies although, unlike here, the right to bid was extended to *all* its other employees. 314 NLRB at 1148. In addition, unlike here, the employer did not defend on the ground of past practice. In *Oregon Steel Mills*, the employer did not allow unreinstated strikers to bid on vacant positions because its practice was to limit bidding to its ''existing work force.'' The flaw in the employer's position was that unreinstated strikers are legally part of the employer's ''existing work force.'' 291 NLRB at 194. Moreover, unlike here, the employer failed to point to a past practice. In the instant case, it would defy language and common sense to say that unreinstated strikers are ''actively at work.'' Clearly, they are not. The expired contract and past practice extend bidding rights only to employees who are ''actively at work.'' The Respondent was obligated to follow this practice. Its act of doing so was therefore nondiscriminatory and lawful.

[3] My colleagues find a violation based on *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), and fault the Respondent for not directly presenting evidence that its actions concerning the crossover employees were motivated by legitimate objectives. My colleagues' analysis is flawed. The General Counsel did not try this matter on a *Great Dane* theory. It is my colleagues that err twice: once by finding a violation on a theory not urged and a second time by faulting the Respondent for not rebutting that unalleged theory. In these circumstances, I rely on the plain language of the policy, as applied, which leads to the conclusion that no unlawful discrimination took place.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT give preferential treatment to our employees who quit a strike in progress and return to work.

WE WILL NOT discriminate against full-term strikers in job assignments.

WE WILL NOT tell our employees that we have given preferential treatment to employees who quit a strike in progress and return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the June 8, 1992 move at the Track Type Tractor Business Unit, WE WILL reassign employees according to seniority, and WE WILL make whole any employee who was disadvantaged, as a result of the June 8, 1992 move, for any loss of wages or other benefits, with interest.

WE WILL rescind the job assignments based on the postings of April 14 to 16, 1992, WE WILL reopen these jobs for bidding, and WE WILL make whole any employee who was disadvantaged, as a result of job assignments based on these postings, for any loss of wages or other benefits, with interest.

CATERPILLAR, INC.

Deborah A. Fisher, Debra L. Stefanik, and *Valerie L. Ortique, Esqs*., for the General Counsel.
Columbus R. Gangemi Jr., *Gerald C. Peterson,* and *Joseph J. Torres, Esqs*., of Chicago, Illinois, and *Thomas G. Harvel, Lee Smith, Esqs*., of Peoria, Illinois, for the Respondent.
Stanley Eisenstein, Esq., of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This phase of the consolidated proceeding was tried before me on February 28 and March 1 and 2, 1994, at Peoria, Illinois, and deals with allegations that Caterpillar, Inc. (the Respondent) discriminated against returning strikers by giving job preference to individuals who had abandoned the strike, and thereby violated Section 8(a)(1) and (3) of National Labor Relations Act (the Act). It is also alleged that the Respondent violated Section 8(a)(5) by refusing to furnish the Charging Party requested information: the names of the employees who abandoned the strike and returned to work in April 1992.

The Respondent denied that it enegaged in any unfair labor practices and affirmatively contends that it treated those employees (crossovers) who abandoned the strike as permanent replacements which was its right; that it was justified in refusing to furnish to the Union the names of the crossovers; and that both complaints are barred by Section 10(b) of the Act.

Although the captioned cases were consolidated with others for trial, they have been severed for briefing and decision. Nevertheless, those relevant portions of the record made at other times have been considered, along with briefs and arguments of counsel. On the record as a whole, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation with its principal office at Peoria, Illinois, and facilities throughout the United States and overseas. The Respondent is engaged in the manufacture and sale of heavy construction machinery and related products. In the course and conduct of this business, the Respondent annually sells and ships directly to points outside the State of Illinois goods, products, and materials valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The Charging Party, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 974 are admitted to be, and I find are, labor organizations within the meaning of Section 2(5) of the Act. Herein ''Union'' refers to the International alone or with Local 974.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts in Brief*

The material facts in this phase are largely undisputed. Those facts which are in dispute, dealing primarily with precise words allegedly used by management personnel in various meetings, are not of much significance.

In an effort to secure a favorable collective-bargaining agreement to replace the one expiring in October 1991,[1] the Union called a selective strike at two of the Respondent's facilities. The Respondent then locked out employees at other facilities in the Peoria area, but terminated the lockout on February 16, 1992,[2] whereupon the Union converted the lockout to a strike. Thus by early April, roughly 14,000 bargaining unit employees represented by the Union were on strike. Those employed at the York, Pennsylvania; Denver, Colorado; Memphis, Tennessee; and Morton, Illinois facilities did not strike.

On March 31, the Respondent notified the Union that it was going to implement its final contract offer April 6, and if employees did not return to work by that date, it intended to begin hiring permanent replacements.

Between April 6 and 14 when the Union recessed the strike,[3] about 1000 striking employees returned to work at various of the struck facilities, including the Track Type Tractor Business Unit (TTTBU) at East Peoria, the only facility involved here. It is unknown, and not of importance at this stage of the proceeding, how many employees returned to work at TTTBU. The parties stipulated to the names of some and agreed their treatment was representative of all crossovers at that facility. They further agreed that in the event of a remedial order, more detail concerning whether and to what extent noncrossovers had been discriminated against could be dealt with in a compliance proceeding. Thus, the parties stipulated to a sample of 21 crossovers and 47 noncrossovers, their seniority dates, shifts, classifications, and departments.

Occurring independently of the strike was modernization of the TTTBU under the acronym PWAF (plant with a future). According to the Respondent, this resulted in a surplus of the workforce such that there were insufficient designated jobs for all of the returning strikers. Nevertheless, since the Respondent agreed in its implemented proposal to guarantee a job for each incumbent employee for 6 years, all strikers were taken back. The Respondent made some effort to effect an orderly restaffing based on production needs. Thus on

[1] Traditionally the parties have negotiated a central agreement and local supplements covering particular facilities.

[2] All dates hereafter are in 1992, unless otherwise indicated.

[3] Subsequently there have been seven short work stoppages at one or more of the Respondent's facilities. A strike involving generally these same employees began on June 20, 1994, and continues to the date of this decision.

April 20 about 1900 (of 2800) employees were taken back, which number apparently included crossovers as well as full-term strikers. The next week, 300 were taken back the next week and about 100 per week returned until May 26 when the remaining about 300 returned. Although no striker came back unless there was work for him, because of the PWAF, about 200 had no specific jobs and were ultimately assigned to the work pool. When the strike ended, the Respondent was producing 10-1/2 machines a day. This was raised to 16-1/2 when all the strikers returned.

On June 8, according to testimony of the Respondent's witnesses, a final restaffing was ordered whereby nearly 500 employees were moved from their reinstated shift/classification /department. In most cases, for those in the stipulated sample, the change was from the first to the second or third shift. Some cases involved a change in classification and some a change in department. A few involved changes in two or all three. In any event, each of the 500 suffered some work related disadvantage as a result of the adjustment.

Crossovers were expressly excluded from this move, notwithstanding that every crossover had less seniority than some full-term striker within the same classification.

In a meeting on April 23 between representatives of the Respondent and the Union, the Union asked to be furnished a list of the crossovers. The Respondent refused on grounds that crossovers had been harassed by those who continued to strike. The Union stated that the information was needed in order to insure that insurance payments were correctly made. The Respondent stated that it would pay the April insurance for crossovers. In subsequent letters, the Union again requested the names of the crossovers, stating such was necessary to ensure that strikers were not discriminated against. The Respondent has continued to refuse but offered to furnish the names and relevant payroll data on all employees who were back to work on and after April 20. These refusals are alleged violative of the Respondent's obligation to bargain in good faith.

During the period April 14 to 16, several jobs were posted and were bid on by certain crossovers who were selected but were not assigned until April 20 or later, after the full-term strikers began to return. This is alleged preferential treatment to the crossovers and therefore discriminatory as to the full-term strikers. The General Counsel moved to amend the complaint in order to allege discrimination against a full-term striker in being moved from an assigned job to the workpool in November.

Finally, it is alleged that during employee meetings, management personnel told employees that crossovers had been preferentially treated and had been given ''superseniority.'' These statements are alleged violative of Section 8(a)(1).

B. *Analysis and Concluding Findings*

1. Status of the crossovers

From dicta in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), a body of law has developed to the effect that a struck employer may hire permanent replacements for strikers if such is necessary in order to continue business operations. The Supreme Court, however, agreed with the Board that an employer violates the Act when it discriminates against striking employees because they have exercised their right to strike. While it is common to refer to an employer's right to hire permanent replacements during a strike, this is really an exception to the rule that strikers cannot be discriminated against.

Thus, in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), the Court found it inherently discriminatory against strikers, and therefore violative of the Act, for an employer to grant 20 years' additional seniority to replacement employees. This type of preferential treatment of replacements is commonly referred to as superseniority.

The issue here concerns whether the Respondent might treat the crossovers as permanent replacements and whether its treatment of the crossovers amounted to an unlawful grant of superseniority and therefore discriminatory against full-term strikers.

All parties agree that the Supreme Court's holding in *TWA v. Flight Attendants*, 489 U.S. 426 (1989), is applicable notwithstanding that it was decided under the Railway Labor Act. There the Court held that employees who abandoned a strike could be considered the same as permanent replacements and need not be displaced by more senior employees on the conclusion of the strike. As is typical in the industry, TWA and the flight attendants had a complicated seniority system to determine home domicile and flight schedules. By treating crossovers as permanent replacements, once the strike ended more senior full-term strikers were disadvantaged. Nevertheless, the Supreme Court accepted the employer's business justification and found no violation of the applicable law.

TWA had informed its flight attendants that it intended to continue operations during the strike, that any vacancies created by strikers would be filled by permanent replacements or crossovers and that any job and domicile assignments would remain in effect at the end of the strike. The Supreme Court found that ''TWA's promise not to displace working flight attendants after the strike created two incentives specifically linked to the seniority bidding system: it gave senior flight attendants an incentive to remain at or return to work in order to retain their prior jobs and domicile assignment; and it gave junior flight attendants an incentive to remain at or return to work in order to obtain job and domicile assignments that were previously occupied by more senior, striking flight attendants.'' These incentives were critical to the Company's determination, and right, to operate during the strike.

The Respondent argues that under *TWA* it was justified in excluding the crossovers from the June 8 move letter, which was simply the final order of restaffing following return of all the strikers. The General Counsel argues that all the strikers had returned to work by May 26 and therefore the June 8 move was a poststrike event in the nature of a reduction in force. As such, any restaffing had to be based on neutral criteria, such as seniority. Had the crossovers been included, many full-term strikers would have retained better jobs or more a more desirable shift.

Labor Relations Manager David Stevens testified that the June 8 move letter was not a reduction in force (RIF) but was the final order of restaffing following return of all the strikers and that these are reverse concepts. A reduction in force presupposes a downturn in work availability, which results in surplus manpower. A RIF is then run to determine which employees are to be laid off. In contrast, through April and May, work was increasing and the operations managers

were informing labor relations how many workers of particular classifications were needed to produce the targeted number of machines. Labor relations then undertook to select the particular employee to return, and assigned him a classification, department, and shift. Though coded a RIF for computer purposes, the June 8 move was just a restaffing exercise by which all employees would end up with a specific job assignment, or, as was the case for 200 of them, be placed in the work pool. While there was a reduction in work occasioned by the modernizing, that occurred independently of the strike and was determinative of which jobs were available when the strikers returned. In any event, no one was to be laid off.

Stevens also testified that the June 8 letter was the Respondent's third attempt to finalize job assignments, the other two of May 18 and 20 having been scraped because they were not accurate. In one case, a building manager had misunderstood instructions and, therefore, had erroneously stated his manpower needs.

Stevens and Human Resources Manager Kyle Spitzer, however, testified that the crossovers were specifically excluded from consideration in determining which 500 of the 2800 TTTBU employees would be affected by the adjustment. And as early as the April 23 meeting, Corporate Labor Relations Manager Jerry Brust told union representatives that the Respondent had no intention of moving the crossovers out of jobs to which they were assigned on returning to work.

The basic thrust of the General Counsel's argument is the June 8 move letter represented an independent, poststrike event. Therefore, by excluding crossovers from being considered for a job change the Respondent necessarily discriminated against full-term strikers because they had chosen to remain on strike.

No doubt the Respondent was entitled to proceed with the reinstatement of strikers in an orderly fashion based on business needs. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). I reject, however, the Respondent's contention that it had the absolute right to exclude crossovers from consideration in determining which employees to move to different jobs, or shifts, or to be declared surplus and placed in the work pool. In effect, the Respondent argues that until the June 8 restaffing it was unknown what jobs were available for assignment. Notwithstanding that full-term strikers had returned to work, they had not yet been reinstated, therefore, the crossovers could be protected from displacement.

The *Mackay* rule is based on a balancing of employees' statutory right to strike against a company's presumably common law right to operate its business during a strike. Implicit in the right to operate is the necessity to offer permanent jobs to individuals willing to work during a strike. An offer of temporary employment would not seem sufficient to generate much of a work force. As *Erie Resistor* teaches, however, a company may not give striker replacements incentives beyond the promise of permanent employment. Nor may a company reward striker replacements where the effect is to punish strikers because they have chosen to exercise their statutory right to strike.

Such, I conclude, is precisely what the Respondent did here. In addition to giving the crossovers jobs, the Respondent rewarded them by excluding them from the restaffing move of June 8.

No doubt under the authority of *TWA*, had there been insufficient jobs for all the returning strikers, the Respondent would not have been required to displace crossovers in favor of more senior full-term strikers. Such, however, was not the situation. There were jobs for all who returned. Indeed, the Respondent's witnesses admitted that no striker was called back unless there was a job for him, which, of course, is consistent with the orderly recall over a period of 6 weeks. Everyone involved in the June 8 move had been back to work at least 2 weeks, and some returned as early as April 20. When work became available, strikers were recalled and they went to work. Then came the restaffing move; and the question is whether the Respondent was entitled to exclude the crossovers from it. I conclude not.

In *TWA*, supra, the company announced that it intended to operate during the strike with replacements and employees choosing not to strike and that job and domicile assignments would survive the end of the strike. Such was a necessary assurance, otherwise there would be no permanence to the replacement's job. To allow senior full-term strikers to return to their prestrike jobs and domiciles would ultimately have the effect causing layoffs of the replacements. Thus, the Supreme Court held ''that an employer is not required by the RLA to lay off junior crossovers in order to reinstate more senior full-term strikers at the conclusion of a strike.''

Here, by contrast, there was no announcement that crossovers would be assigned more desirable jobs which they could keep notwithstanding the pending restaffing. There is no evidence that such an incentive was necessary in order for the Respondent to operate, as was the specific finding in *TWA*. There is no evidence that any crossover returned to work because he thought he could get a better job or more desirable shift. To the contrary, such evidence as there is (from another phase of this litigation) suggests that crossovers abandoned the strike out of fear that they would lose their jobs to replacements.

Further, the Respondent's witnesses admitted that when each full-term striker was ultimately taken back there was work available and he was assigned a specific job. And the evidence is that each returning striker worked at a specific job assignment from 2 to 7 weeks before the June 8 move. This belies the Respondent's basic assertion that only after all the strikers returned were they sorted out according to the jobs available. It does appear that the reassignment was occasioned by the decision to modernize the TTTBU operation and this was independent of the strike. Nevertheless, the Respondent waited until all the employees had returned to work before implementing this as to the work force. The Respondent could have negotiated with the Union about the return of the strikers from the basis that all employees would have a job but that there would be reassignments as a result of the modernizing. It did not do so.

This situation may be similar to *TWA*, but it is fundamentally different. Here, the Respondent did not prove any necessity for protecting the job assignments the crossovers received when returning to work. Indeed, the only available evidence is that the decision to exclude the crossovers from the restaffing move was made after the Union recessed the strike. I conclude that the Respondent's decision was to reward the crossovers, a conclusion supported by recurring statements of management to the effect that the crossovers were ''heroes.''

To reward employees for abandoning a strike, even though they had the right to do so, is clearly unlawful. The effect of this was punishment of those who continued to strike which was also unlawful. Therefore, I shall recommend an appropriate remedial order for these violations of Section 8(a)(1) and (3) of the Act.

Since the Union was told at a meeting on April 23 that the Respondent would not displace crossovers, and the charge was not filed until December 1, the Respondent contends this matter is barred by Section 10(b). I reject this defense.

Although the Union was on notice that the Respondent intended to do what it did more than 6 months before filing the charge, not all the facts were in place to support the allegations of the complaint. Not until May 26 had all the full-term strikers returned to work and then it was not until the move order of June 8, from which the crossovers were excluded, that facts of this unfair labor practice were finalized. Therefore, I conclude that the limitation period did not begin to run until June 4, when the June 8 move order was published, and that the charge was timely. *Leach Corp*., 312 NLRB 990 (1993).

2. Telling employees that crossovers had superseniority

Alleged as an independent violation of Section 8(a)(1) are certain statements made by various management personnel in meetings during April, June, August, and September to the effect that crossovers could remain on their jobs until some subsequent event.

It is uncontested, for instance, that in all employee meetings in August or September, Vice President Plant Manager Jim Despain told employees that crossovers would be given protection, as he had promised. It is also alleged, and testified to by the General Counsel's witnesses that the term ''superseniority'' was used. The Respondent's witnesses denied he did so. I doubt that he did. I, however, do not have to resolve this credibility conflict because it is undisputed that employees were told that crossovers had received a preference in job tenure.

To tell employees that crossovers received a reward because they had abandoned the strike is clearly interference with the employees' Section 7 right to strike and was therefore violative of Section 8(a)(1). If Despain had said the crossovers were given superseniority, such would have been unlawful in the same manner, but his having not used that word did not change the nature of his statement.

The same is true with regard to other statements made to employees about this matter. Uniformly the Respondent's management people told employees that crossovers had been given a reward for having abandoned the strike. Such was violative of Section 8(a)(1), notwithstanding the Respondent's agents may have believed they had a right to give preferential treatment to crossovers.

3. Poststrike job assignments

Between April 14 and 16 certain jobs were posted and were bid on by crossovers, full-term strikers having not yet returned to work. The bids were accepted, but the assigned employees did not begin working on the jobs until after April 20 when the full-term strikers began returning to work. Relying on *Waterbury Hospital*, 300 NLRB 992 (1990), enfd. 950 F.2d 849 (2d Cir. 1991), the General Counsel contends that the crossovers were not replacements in the new jobs and therefore should not have been excluded from the June 8 move.

The Board specifically held in Waterbury that crossovers who were not working in or in training for a particular job at the time the strike ended could not be considered permanent replacements. I, therefore, conclude that the Respondent unlawfully gave crossovers preferential treatment in job assignments after April 20 based on bids to which full-term strikers had no access. The Respondent thereby discriminated against employees who choose to remain on strike. Such was violative of Section 8(a)(3). Accordingly, I shall recommend that the jobs bid on and assigned to M. A. Smith, G. W. Wagner, Steve Albritton, V. J. Thomas, M. E. Mustard, J. D. Rapp, and J. F. Humphreys be reopened and that full-term strikers be allowed to bid on them, and if successful, be assigned the job.

4. Nick Whitfield assignment

Counsel for the General Counsel moved to amend the complaint to allege that in November the Respondent violated the Act by reassigning Nick Whitfield to the work pool. It is argued that in the normal course of events Whitfield should have been declared surplus and a RIF conducted. In such a case, a junior crossover would have been affected rather than Whitfield.

Notwithstanding the Respondent's protestation that RIF's for just a few people is unproductive, given its act of protecting the assignments of crossovers, this was clearly unlawful. By not running a RIF, the Respondent did not allow Whitfield to exercise his seniority and such had the effect of increasing the seniority of crossovers. The Respondent thereby violated Section 8(a)(3).

5. The list of crossovers

On April 23, the Union first requested the names of the crossover employees, which the Respondent refused. Another request was made on May 21, which again the Respondent refused, instead offering to furnish the names, with seniority, dates, and job classification, of all active employees as of April 20. This response was by letter dated June 23 from Brust.

The Union additionally requested the names of the crossovers on July 2, which was denied by letter from Brust of July 13.

The Charge in Case 33–CA–10038 was filed on December 28, more than 6 months after denial of the initial two requests but within 6 months of the last. The Respondent argues, therefore, that the limitation period of Section 10(b) bars this action. The General Counsel and the Charging Party contend that even if denial of the first two requests is barred by Section 10(b), the July 13 refusal constitutes a new violation of the Act and is not barred.

While the Respondent's argument seems to have some merit, since the Union was fully apprised of the alleged violation more than 6 months before it filed the charge, the Board has recognized the theory of distinct violations in matters such as this. *Resthaven Nursing Home*, 293 NLRB 617 (1989). Accordingly, I conclude that Section 10(b) would not bar issuance of a remedial order on this complaint. I, how-

ever, further conclude that the General Counsel did not prove that the Respondent violated Section 8(a)(5) in refusing to furnish the information in the form demanded by the Union.

The General Counsel argues that the Union is presumptively entitled to the names and payroll records of bargaining unit employees, including strike replacements, citing, among others, *Page Litho, Inc*., 311 NLRB 881 (1993); *Chicago Tribune Co*., 303 NLRB 682 (1991), enfd. denied 965 F.2d 244 (7th Cir. 1992); and, *Georgetown Holiday Inn*, 235 NLRB 485 (1988), wherein it was held that the names of unit employees are presumptively relevant, hence the union need not show a particularized need.

From this general statement of the Board's rule, the General Counsel argues that the Union was ''presumptively entitled to the names, job classifications, departments and shifts of bargaining unit employees who reported to work prior to April 14.'' In short, the General Counsel argues that the Union was presumptively entitled to the names of the individuals who crossed the picket line and returned to work before the strike was recessed in the precise form demanded by the Union. None of the cases, however, relied on so hold.

Thus in *Page Litho*, supra, the union requested the names of striker replacements in order to monitor vacancies among them for purposes of reinstating strikers and to evaluate the company's wage proposals. The company refused and then the union suggested that the company provide payroll information with the names excised. This was done; however, the union found that the information in this form was unusable and again requested the names and gave assurances against misuse. The Board found ''[N]o reported incidents of harassment (occurred) after the strike ended.'' On these facts, the Board found that the information should be furnished and there was no ''clear and present danger'' that it would be misused by the union.

In *NLRB v. Burkart Foam, Inc*., 848 F.2d 825 (7th Cir. 1988), enfg. 283 NLRB 351 (1987), the union had requested the names of striker replacements, including union members who had crossed the picket line and returned to work; however, the union withdrew its request for separate lists. There was no evidence of any specific threat or violence by the union. Nor was there evidence that the company suggested reasonable alternatives which the union refused to discuss. And finally, the union did give assurances that the information would not be misused. Hence the company failed to establish a ''clear and present danger'' that presumptively relevant information would lead to harassment of crossovers.

Such, however, was found by the Seventh Circuit not to be the case in *Chicago Tribune*, supra. Although the court questioned the ''clear and present danger'' test in these situations, which it had approved in *Burkart Foam*, supra, there was evidence of violence and that striker replacements had been harassed.

In *Chicago Tribune*, supra, the court held that whether an employer violates Section 8(a)(5) in refusing to ''disclose the information in the form demanded, the judge must have due regard for the interests of third parties, including workers, even replacement workers.'' 965 F.2d at 247. The court further noted that evidence showed some involvement by the union in violence against replacements and further, the union refused to accept alternatives which the Board had suggested were completely adequate. The Board's holding had turned on the fact that some months after the demand and refusal, the company did disclose the information, which indicated that its initial refusal was a pretext. This the court rejected and concluded that the company did not violate its bargaining obligation by refusing to furnish the information in the form demanded, where there was accompanying violence and the union refused to consider acceptable alternatives.

While there is a presumptive relevance to the names of unit employees, including those who crossed the picket line, whether that information is required to be furnished the form demanded must be evaluated in context of all the facts. As the Board noted in *Page Litho*, supra, these are fact cases, and the court's holding in *Chicago Tribune*, supra, was necessarily dependent on the facts of that case. Since *Page Litho* was ''factually distinct'' from *Chicago Tribune*, the employer was ordered to furnish the names of replacements.

Here, the Respondent offered to furnish the names and payroll data of all employees at work from and after April 20, the first day full-term strikers began returning to work. The General Counsel and the Charging Party contend this is inadequate but do not explain why—or at least not persuasively. They contend that the names of the crossovers are needed in order to process grievances of full-term strikers who claim to have been disadvantaged by the grant of superseniority to crossovers. It is unclear what a list of crossovers would provide that a full list of employees would not. If a returning striker believed himself disadvantaged because he did not return to the job he had before the strike, a list of employees in his department on his prestrike shift, along with their seniority dates should suffice to make out a prima facie case. The Respondent could then defend, or not, on grounds that a less senior person was assigned the job for some reason, including that the individual was a crossover/replacement.

In evidence are 22 such grievances. They have been denied and not further processed, not because the Union did not have a list of crossovers but because the parties have no contract and, therefore, no arbitration procedure.

I simply do not accept the argument that the information requested was not usable in the form offered by the Respondent; nor is there evidence that the Union in fact attempted to take and use the information in the form offered. The Union's failure in this respect distinguishes this matter from *Page Litho*, supra.

Unlike cases relied on by the General Counsel, there is here much evidence of harassment of, and some violence to, crossovers. After the crossovers returned to work, some reported nails in their home driveways, receiving threatening calls, and messages. When they crossed the picket line to return to work they were yelled at with abusive and threatening language. Rocks were thrown and there was some beating of automobiles.

The Union, however, argues that assurance against misuse was given in a footnote to the request of May 21: ''This letter constitutes the UAW's written assurance that the disclosure of the names will not be use for any illegal interference or coercion of the Section 7 rights of employees who chose to cease striking prior to the UAW's unconditional offer to return to work.'' The Respondent did not find this particularly reassuring in view of the continuing nature of the harassment. Nor is such a statement dispositive. For instance, in *Page Litho*, supra, assurance against misuse was considered a factor in requiring disclosure of the requested information,

but in the context of ''No reported incidents of harassment'' after the strike ended.

Although there is no direct evidence that the harassment of crossovers was orchestrated by the Union, or any of its local officers, there is a great deal of evidence (which will be treated in detail in subsequent decisions) that the harassment continued after the strikers returned to work. This took the form of buttons, and other insignia with the word ''scab'' (including a 2-by-4 board about 6-feet long with the words ''scab swatter''). Many of the crossovers were known and were called scab and worse and many were expelled from union membership. The General Counsel seems to argue that these events were trivial or did not happen because some off the proof is based on hearsay evidence.

Although hearsay is generally not admissible because it is inherently unreliable, it is not necessarily untrue. Here, there are in the record many hearsay reports of violence, threats, and harassment of crossovers. There is also a great deal of direct evidence that crossovers were threatened when they went to work, were vilified at work after the strike was over, and were the object of harassment.

While such does not prove the Union or its officers were responsible, it forms the factual context in which the Union's request for the names of crossovers must be evaluated. It may be the Union cannot control all its members; however, there is no evidence it tried, and substantial evidence that some of this activity against the crossovers was condoned, if not encouraged. In the face of overwhelming evidence of anticrossover activity, I do not have to accept the Union's profession of innocence. On such a matter as this, the trier of fact is not required to be ''naif.'' *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). To the contrary, given the absence of evidence that any officers of the Union made any effort to dissuade members from harassing crossovers, I conclude this activity was, at a minimum, condoned by inaction.

Some of this anticrossover activity was no doubt permissible, such as expelling them from membership. Some was not. For purposes of this decision, the point is that harassment of crossovers has continued unabated since they choose to return to work in April 1992. The fact that strikers and union officers have also been harassed and threatened, as I believe they have been, does not alter this fact. This labor dispute has generated a huge amount of animosity and it is in that context that the Respondent refused to furnish a separate list of the crossovers.

Accepting the Board's standard of ''clear and present danger,'' notwithstanding such has been questioned in the circuit where this case arises, I conclude the Respondent met its burden. I believe and find that crossovers were substantially harassed and that the Respondent had a good-faith belief they were. I further conclude that the totality of conduct toward the crossovers was not trivial. Finally, I conclude that the Union did not show why the alternative proposed by the Respondent would not allow it to perform as the employees' bargaining representative. And it is in this function which determines whether information need be furnished. The Union may well have institutional reasons for wanting the list of crossovers. Such institutional reasons are, however, not recognized under the broad umbrella of *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). A union's entitlement to information from an employer is dependent on its representational capacity, and not on interests of institutional concern unrelated to representing bargaining unit employees concerning terms and conditions of employment.

Finally, I note that the Union sought the names of all 1000 crossovers, yet the argued basis was that the returning full-term strikers at the TTTBU had been disadvantaged. There is no indication or argument that crossovers at any other facility were treated preferentially. Thus, even if the Union's argument were accepted, such would not support a general list of crossovers. This suggests that a principal reason for demanding the list was for institutional purposes.

I conclude that the General Counsel did not establish by a preponderance of the credible evidence that the Union was entitled to a separate list of the crossovers and further, that the Respondent demonstrated a clear and present danger that such a list would lead to increased violence to or harassment of crossovers. Further, the Union did not prove why the Respondent's suggested alternative was unusable or give satisfactory assurances that such a list would not be misused. In short, I conclude that the Respondent did not violate Section 8(a)(5) as alleged in Case 33–CA–10038, and I shall recommend this complaint be dismissed in its entirety.

IV. REMEDY

Having concluded that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take action necessary to effectuate the policies of the Act, including reassigning and making whole any full-term striker who was disadvantaged as a result of the Respondent's preferential treatment of crossovers in excluding them from consideration in the June 8, 1992 reassignment at the Track Type Tractor Business Unit and as a result of job assignments based on postings between April 14 and 16. Any loss of pay will be reimbursed with interest as provided for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Reassignment of Nick Whitfield is subsumed in the broader remedy and, therefore, need not be specifically ordered.

[Recommended Order omitted from publication.]